Supreme Court, U.S.
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No. 94-

In The

Supreme Court of the United States

October Term, 1993

LARRY PAYNE,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Superior Court of the State of California for the County of San Diego and the Court of Appeal Fourth Appellate District, Division One, State of California err in deciding that plaintiff's action for strict products liability and negligence were barred by the government contractor defense?

II. What constitutes "military equipment" subject to the government contractor defense in *Boyle v. United Technologies Corp.*, 487 US 500, 108 SCt 2510 (1988)?

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DECISION BELOW

The Court of Appeal Fourth Appellate District, Division One, State of California, on September 30, 1993, Case No. DO16460, affirmed the summary judgment of the Superior Court of the State of California for the County of San Diego, Case No. 627085, in favor of defendant Newport News. The Supreme Court of the State of California denied plaintiff's Petition for Review on December 29, 1993.

JURISDICTION

This petition seeks review of the decision of the Court of Appeal, Fourth Appellate District, Division One, State of California, filed on September 30, 1993. Consequently, jurisdiction is appropriate pursuant to 28 U.S.C. Sec. 1254(1). This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. Sec. 2101(c).

STATEMENT OF THE CASE

This case began on September 4, 1989, when Petitioner Larry Payne, a U.S. Navy Sailor, suffered a severe shoulder injury while on active duty aboard the Navy aircraft carrier USS RANGER. The injury occurred when a handrail he was stepping on broke and caused him to fall. Moments prior to the accident, Larry Payne and Victor Caraballo (Payne's superior) were lowering a series of oil cans from the number two deck, down six levels to the number eight deck. Ropes were used to aid

in lowering the oil cans. The oil cans were being lowered to the number 3 main machinery room.

After lowering all of the oil cans to Caraballo, who was positioned all the way down in the number 3 main machinery room, Payne began to descend the vertical ladder to the machinery room, shaft alley. When Payne arrived at the machinery room entrance, Caraballo was standing at the bottom of the ladder untying the rope on the last set of oil cans. At this point, Caraballo was blocking Payne's entrance into the machinery room. Caraballo instructed Payne to "step over" (motioning that Payne step over onto the handrail and setup around Mr. Caraballo). When Payne stepped on the tubular metal horizontal portion of the handrail it broke and caused him to fall approximately three to four feet onto the walkway and onto the oil cans that had just been lowered. Payne landed on the oil cans with the right side of his body, dislocating his right shoulder and injuring his hip.

As a result of the accident, Payne filed suit against defendant Newport News Shipbuilding and Dry Dock Company, Inc., alleging two causes of action: (1) strict products liability (based on defective design and manufacture of the handrail); and (2) negligence. Judge Haller of the San Diego County Superior Court granted Newport News' Motion for Summary Judgment based on the government contractor defense, or, as it is commonly referred to, the "Boyle" defense. Payne contended that the handrail was unsafe because the vertical stanchions supporting the horizontal rail were spaced too far apart, thereby allowing the horizontal rail to bow and break due to lack of support.

Petitioner Payne appealed the order granting summary judgment, claiming summary judgment was improper because: (1) defendant Newport News was not entitled to judgment based upon the *Boyle* defense; (2) the lower court abused its discretion by granting summary judgment when issues of material fact were present; and, (3) the *Boyle* defense does not apply to causes of action for negligence.

The Fourth District Appellate Court, for the State of California, Division One, affirmed the judgment of the trial court in granting summary judgment in favor of the defendant. The Court of Appeals ruled that the government contractor defense applied to the handrails in question. The Court did concede that the *Boyle* defense may not apply to causes of action based on allegations of negligence manufacture, but did not pursue the question. Payne's Petition for Review was denied by the California Supreme Court on December 29, 1993.

ARGUMENT

IMPORTANCE OF THE CASE

This case is of critical importance because the government contractor defense is being stretched far beyond its intended bounds. Plaintiff's counsel had another products liability case involving a metal water pitcher which was thrown out of court by way of summary judgment relying on the government contractor defense in a case known as *Carmen Fuentes v. Nash Metalware Company, Inc.*,

Case No. CV 86-1793 S, U.S. District Court for the Southern District of California. Fuentes was a galley subcontractor employee at the Naval Station in San Diego who was severely burned when the handle on a metal pitcher filled with scalding water broke. Summary judgment in favor of the defendant manufacturer was granted pursuant to the government contractor defense because the metal pitcher was sold to the Navy through a government contract that gave rough specifications for the pitcher's size.

The spread of the government contractor defense to common household items such as water pitchers and handrails is a serious issue worthy of the Supreme Court's attention.

THE GOVERNMENT CONTRACTOR DEFENSE IS INAPPLICABLE BECAUSE THE HANDRAIL IN QUESTION IS NOT MILITARY EQUIPMENT

The government contractor defense has evolved under American case law to grant to government contractors working for the United States government an extension of the immunity from liability the government itself enjoys. The immunity can be invoked by government contractors if they can show that, in the design of military equipment ordered by the government, a design deficiency falls within the discretionary performance specifications set for the equipment by the government itself. The United States Supreme Court embraced this defense in *Boyle v. United Technologies Corp.*, 487 US 500, 108 SCt 2510 (1988).

In *Boyle*, a military pilot died when his helicopter crashed into the sea off the Virginia coast. The pilot's escape from the submerging aircraft was prevented by an escape hatch that failed to open due to water pressure against the hatch. The Supreme Court ruled that a suit by the pilot's estate against the manufacturer under state tort law was preempted by federal law, due to the federal interests implicated by the case, and that the government contractor defense had been satisfied.

Specifically, the Court reiterated three elements that had to be satisfied for the defense to apply:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when:
>
> (1) the United States approved reasonably precise specifications;
>
> (2) the equipment conformed to those specifications; and
>
> (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Boyle*, 487 US at 512, 108 SCt at 2518.

The government contractor defense has been adopted by the Ninth Circuit and California Law. *McKay v. Rockwell Int'l Corporation*, 704 F2d 444, 449 (9th Cir 1983); *Vernmuelen v. Superior Court*, 204 Cal. App. 3d 1192, 1200-1201 (1st Dist. 1988).

The criteria for "military equipment" under the Boyle defense is spelled out in a Ninth Circuit decision known as *In re Hawaii Federal Asbestos Cases*, 960 F2d 806, 812 (9th

Cir 1992), in which the Ninth Circuit held that shipboard asbestos insulation was *not* military equipment because it "was not manufactured with the special needs of the military in mind." If shipboard asbestos is not "military equipment," then shipboard handrails are certainly not "military equipment." The handrails on USS RANGER were not manufactured with the special needs of the military in mind and they were not designed for any special military purpose. These were not "high-tech" handrails. They were common, ordinary handrails.

There is no governmental contractor defense for paint. *Neilson v. George Diamond Vogel Paint Co.*, 892 F2d 1450 (9th Cir 1990). The paint was not designed for any special military purpose. *Neilsen*, supra at 1453.

The military contractor defense does not apply to "an ordinary common product purchased by the armed forces." *McKay v. Rockwell Int'l Corp.*, 704 F2d 444 (9th Cir 1983), cert. denied, 464 US 1043, 104 SCt 711, 79 LEd 2d 175 (1984). Clearly a handrail is an ordinary consumer product to which the military contractor defense does not apply.

According to the Ninth Circuit, "where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." *In re Hawaii Federal Asbestos Cases*, supra, at 811; *Boyle*, 487 US at 509, 108 SCt at 2516. There is no difference between the handrails on military ships and the handrails on commercial ships.

Boyle's allowance of the military contractor defense is based on a trade-off between greater safety and greater

combat effectiveness. *Boyle,* 108 SCt 2517. No such situation exists in the instant case. Unsafe handrails on the USS RANGER do not enhance its combat effectiveness.

THERE WAS NO "APPROVAL" OF SPECIFICATIONS BY THE GOVERNMENT

Even though the Supreme Court set the standard for government immunity in *Boyle,* it did not resolve the issues of what was meant by "the United States approved . . . " or "reasonably precise specifications." These issues were not before the court.

This left the various circuits to clarify and define just what "approved" and "reasonably precise specifications" actually entailed. The Fifth Circuit was the first circuit to address these issues when it issued the decision of *Trevino v. General Dynamics Corp.,* 865 F2d 1474 (5th Cir. 1989), cert denied, 110 SCt 327, 107 LEd 2d 317 (1989). Since its publication, the *Trevino* decision had been the most widely cited and followed opinion pertaining to these two issues in the *Boyle* opinion. When the U.S. Supreme Court denied General Dynamics' Writ of Certiorari, the U.S. Supreme Court accepted *Trevino's* interpretation of "approval by the government" and "reasonably precise specifications" and made it the law throughout the entire United States.

In *Trevino,* General Dynamics designed a diving chamber out of two large cylinders that had previously been used as missile storage hangers on a U.S. Navy submarine. A defect in the design of the chamber caused a vacuum to form while the chamber was being drained, leading to the deaths of five Navy divers. General

Dynamics asserted the government contractor defense, arguing that the Navy had approved all features of the diving chamber design. The Fifth Circuit Court of Appeals disagreed. Since the design and layout of the chamber was solely the work of General Dynamics (just as the design and layout of the handrail in this case was solely the work of Newport News), the court determined that the Navy had delegated its discretion to General Dynamics. As such, General Dynamics was not entitled to the *Boyle* defense because the mere signature of a government official on design drawings did not constitute "approval" pursuant to *Boyle*. Elaborating on this point, the Court stated:

> The mere signature of a government employee on the "approval line" of a contractor's working drawings, without more, does not establish the government contractor defense.
>
> * * * *
>
> If the government contractor exercised the actual discretion over the defective feature of the design, then the contractor will not escape liability via the government contractor defense – the government's **rubber stamp** on the design drawings notwithstanding.
>
> * * *
>
> The government exercises its discretion over the design when it actually chooses a design feature. The government delegates the design discretion when it . . . contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the government, requiring

> only that the final design satisfy minimal or general standards established by the government. *Trevino*, at 1480. (emphasis added).

The first prong of the *Boyle* defense establishes that the government must approve reasonably precise specifications. *Boyle*, at 512, 108 SCt at 2518. In the *Trevino* case, supra, the court held that approval under the *Boyle* defense **required more than a "rubber stamp"**. *Trevino*, at 1480 (emphasis added). Under subsequent federal case law, it has been held that approval by the government is shown when a defendant can demonstrate a "continuous back and forth" discussion between it and the government regarding product design, that is, specific review, evaluation, and testing by government personnel who can order changes in the design. *Stout v. Borg-Warner Corp.*, 933 F2d 331, 335 (5th Cir 1991) (Army reviewed, evaluated, tested and approved detailed design drawings at different stages during the design process, and later the prototype air conditioner model); *Skyline Air Service v. G.L. Capps Co.*, 916 F2d 977, 980 (5th Cir 1990) (government closely reviewed, revised, and approved each of the detailed specifications for the UH-1B helicopter – no deviations allowed without specific written government approval).

Careful analysis of the facts of each case must occur, however, to see that approval following continuous back and forth discussion between the contractor and the government indeed took place. If the government merely "signs off" on a design feature proposed or supplied by the contractor, approval has not occurred:

> If the government delegates its design discretion to the contractor and allows the contractor to

> develop the design, the government contractor defense does not apply. **A mere rubber stamp** by a federal procurement officer does not constitute approval and does not give rise to the government contractor defense. *Trevino*, supra, at 1486. (emphasis added).

Newport News places great emphasis on the argument that had the Navy not "approved" the handrail design aboard the USS RANGER, the Navy would never have accepted delivery of the ship upon its completion. As proof, Newport News points to the signature of an unspecified Navy employee on each of the drawings **developed, drawn,** and **supplied** by Newport News, – drawings 665-367, 200169, and 665-403. Newport News would have the Court believe that as soon as the signature appears on the drawings, the approval element of the first prong of the *Boyle* defense is satisfied. But as stated in *Trevino* and its lineage of case law, the signature of a government employee in an approval box is not enough, it is merely a "rubber stamp."

Newport News bears the burden of proving there was continuous back and forth discussion with the Navy over the handrail placement and configuration in question. Furthermore, Newport News has the burden of proving that the governmental employee who signed the approval be more than a simple federal procurement officer as the *Trevino* court required.

Newport News has not established any back and forth discussion with the Navy. The Navy approval signatures on Newport News' drawings were "rubber stamp" signatures, and Newport News has not proven, and cannot prove the contrary. Approval of the design is an

element of the affirmative defense Newport News must conclusively establish. Newport News has failed to carry this burden. Thus, the approval element of the first prong of *Boyle* has not been satisfied.

THERE WERE NO PRECISE SPECIFICATIONS FOR THE HANDRAIL

The second part of *Boyle's* first prong requires that the specifications be reasonably precise. As explained above, the *Boyle* opinion did not define what reasonably precise meant. That definition was provided by the *Trevino* opinion, which states:

> Under the first element (of *Boyle*) the government must approve *reasonably precise specifications*. The requirement that the specifications by precise means that the discretion over significant details and all critical design choices will be exercised by the government. If the government approved imprecise or general guidelines, then discretion over important design choices would be left to the government contractor.
>
> *Trevino*, at 1481 (emphasis in original and added).

The evidence of record demonstrates that Newport News and not the Navy (as *Trevino* requires) had the discretion over significant details and all critical design choices of the handrail in question.

The role of Newport News as the sole discretionary authority in regard to the design and configuration of the handrail can be seen through Newport News' own liability expert, Mr. Sampsel. When Mr. Sampsel was asked

in his deposition whether drawing number 200169 represented the actual layout or configuration for the handrail system, Mr. Sampsel replied:

> "There are two other related drawings. I think we need to define what's commonly termed 'field run' in the shipbuilding, ship construction area. Certain things are given to you as guidance or design information, and then you go down on the ship and you are expected to run it from point "A" to point "B" in accordance with the specifications you've been given to the best of your ability." (Deposition of Sampsel 47:17-25; 48:5-14).

In other words, it was the Newport News shipfitter who installed the handrails and exercised discretion over how and in what manner the handrails were to be configured, and how far apart the vertical stanchions were to be, not the Navy. Therefore, it was an unknown Newport News shipfitter who actually exercised discretion of the critical design choices of the handrail in question, and not a governmental employee as both *Boyle* and *Trevino* require.

Nevertheless, Newport News claims that it is absolved of liability under the first prong of the *Boyle* defense because the specifications and design drawings for the construction of the USS RANGER were reasonably precise. The evidence it produced to support its contention includes:

- General Specification for Machinery for Vessels of the U.S. Navy
- CV 61 Ship Specifications (Confidential), Section S16-1-g at pp. 200-201.

- Bureau of Ships Drawing No. S1604-860040.
- Bureau of Ships Drawing No. S1604-860039.
- Federal Specification WW-T789a.
- Newport News Drawing No. 665-367.
- Newport News Drawing No. 200169.
- Newport News Drawing No. 665-403.

Newport News argues that these drawings and specifications describe, in total, the relevant characteristics of the handrail system in question. A facial examination of these documents will show, however, that none of them illustrate the **physical placement, location,** or **configuration** of the handrails or vertical stanchions for the handrails in the number 3 main machinery room aboard the USS RANGER.

As far as the three other drawings that were prepared by Newport News, defendant cannot rely on these documents to show that the Navy exercised any discretion because these drawings originated from Newport News and not the Navy. These drawings actually demonstrate that Newport News and *not* the Navy had discretion over the details and the critical design choices for the handrails.

The documents provided by the Navy show that the "general" specifications for machinery for vessels are just that – *general* specifications. Such documents are not precise (*See, Trevino,* at 1480). The location and arrangement of the handrails is a central issue in this case. The drawings and specifications do *not* show placement of the handrails or vertical stanchions, therefore they are not reasonably precise. Plaintiff's expert, Allen Robinson, so

concludes in paragraphs 3 and 4 of his Declaration in Opposition to Summary Judgment:

> 3. I have reviewed each and every document attached to Newport News' Summary Judgment Motion. Out of all of those drawings and specifications, not one of them specifies how the handrail system is to be designed and configured. Certainly, none of these documents specify at what distance each support or stanchion must be placed along the handrail.
>
> 4. The government drawings and specifications cited by defendant Newport News do not state in a reasonably precise manner how the handrail was to be designed or configured.

At the risk of belaboring the obvious, plaintiff notes the lack of precision in the documents regarding placement of the stanchions along the handrail, as well as the configuration of the handrails in general. When it is shown, as here, that the government did not provide sufficiently precise oversight and direction of the design and manufacture of a product, the *Boyle* defense cannot be invoked. *Chapman v. Westinghouse Electric Corp.*, 911 F2d 267, 271-272 (9th Cir 1990).

Newport News has failed to meet the first prong of *Boyle* by failing to show the specifications were (1) approved, and (2) reasonably precise.

The handrails did not "conform" to a set of "reasonably precise specifications" because there were none. The design and configuration decisions were left to the Newport News shipfitter conducting the "field run." This indicates the contractor did not follow any government

specifications. This exact point was addressed by the *Trevino* court when it stated:

> the same is true for the second element, which requires that the equipment conform to the specifications. If the contractor were free to deviate from the government's specifications, then discretion over the design choices would be exercised by the contractor, not by the government. *Trevino*, at 1481.

Furthermore, since the drawings do not show the configuration of the handrails for the number 3 main machinery room, then conformity cannot be established.

In addition, David Christy, another of defendant's liability experts, testified via a declaration that none of the various handrails he inspected upon the USS RANGER conformed to the drawings. In an attempt to defend this glaring admission, Newport News attempts to explain the nonconformity away by saying this nonconformity was due to the replacement and repairs to the handrails in the various shaft alleys. However, this contention is expressly contradicted by the response letter of Judy Wise dated December 18, 1991, to Payne's Freedom of Information Act Request directed to the Naval Sea Systems Command, Aircraft Program. The request was for any ship alterations that impacted handrails in the shaft alleys upon the USS RANGER. In her response, Ms. Wise stated:

> A thorough search produced no records of any ship alterations performed on handrails in the shaft alleys. There was only one ship alteration

> authorized in shaft alleys. That alteration concerned the shaft seals and has not yet been accomplished.

Therefore, the second prong of the *Boyle* defense has not been satisfied, and entry of Summary Judgment based on this ground was erroneous.

CONCLUSION

For the reasons set forth above, the appellate court and trial court decisions granting and affirming summary judgment for the defendant on the basis of the *Boyle* defense are inconsistent with existing U.S. Supreme Court and Ninth Circuit decisions on the government contractor defense. The lower court decisions went far beyond the parameters of the government contractor defense and should be reversed.

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Fourth Appellate District, Division One, No. DO16460
S036043

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

LARRY PAYNE, Appellant

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Respondent

SUPREME COURT
FILED
DEC 29 1993

Robert Wandruff Clerk
DEPUTY

Appellant's petition for review DENIED.

LUCAS
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LARRY PAYNE, Plaintiff and Appellant, v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Defendant and Respondent.	D016460 (Super. Ct. No. 627085 (Filed Sept. 30, 1993)

APPEAL from a judgment of the Superior Court of San Diego County, Judith L. Haller, Judge. Affirmed.

Larry Payne (Payne), a sailor stationed aboard USS *Ranger* (CV61) was injured on the ship in the course of his duty. Payne sued Newport News Shipbuilding and Dry Dock Company (Newport News) on a theory of strict products liability, alleging both defective design and defective manufacture of *Ranger*. Payne appeals following a grant of summary judgment in favor of Newport News. Payne asserts the trial court improperly determined this case was one in which Newport News was entitled to the government contractor defense set out in *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 (hereafter, *Boyle*). We reject this assertion, and affirm.

BACKGROUND

Early in 1954 (during President Eisenhower's first term) the United States Navy contracted with Newport

News for construction of the third in a series of four "Forrestal" class aircraft carriers, USS *Ranger*. *Ranger* was commissioned as CVA 61 in 1957, beginning an unusual 36-year assignment of active service in the Pacific Fleet exclusively (often homeported in San Diego), from which she has only recently retired.[1]

Ranger was built by Newport News according to a detailed and comprehensive set of United States Navy specifications, including specifications generally applicable to naval vessels, as well as detailed specifications peculiar to *Ranger's* construction. These specifications included both general and specific directions as to the sizing, material and installation procedures for handrails to be installed in the machinery spaces of *Ranger.*

The United States Navy also approved Newport News drawings which called for use of handrail materials on board *Ranger* which were in accordance with the Navy's own specifications. There was no danger known to Newport News in such adherence to government specifications in construction of *Ranger* handrails.

Payne was assigned to duty on *Ranger* in 1989, in the thirty-third year of *Ranger's* service. In his second week on board, he was lowering oil cans down a ladder to a shipmate standing on a deck in the machinery spaces.

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[1] Of four "Forrestal" class carriers (*Forrestal*, CV 59, *Saratoga*, CV 60, *Ranger*, and *Independence*, CV 62), all but *Saratoga* were built by Newport News. In fact, every carrier laid down since 1957, including all of the current "Nimitz" class, the largest warships ever built, has been constructed by Newport News. (Polmar, The Ships and Aircraft of the U.S. Fleet (Naval Institute Press, 14th ed. 1988) "Aircraft Carriers" pp. 80-91.)

After lowering the cans, Payne began to descend the ladder. As the shipmate blocked the bottom of the ladder, Payne stepped over him and stood upon a handrail. When Payne put his weight on the handrail it broke, injuring him. Following Payne's accident, he sued, alleging Newport News was liable for an assertedly defective design and manufacture of the handrails in *Ranger's* machinery spaces.[2]

Newport News moved for summary judgment on the basis that the government contractor defense, as set out in *Boyle, supra,* 487 U.S. 500, applied to this case. The trial

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[2] The pleadings and theory of liability are otherwise unremarkable, but it is the context of this litigation which removes it from the ordinary, as there are several unusual circumstances surrounding this case.

First, *Ranger,* of course, had been at sea for six years before the California Supreme Court established the doctrine of strict products liability, in the case of *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 60-64.

Second, that decision itself, of course, permitted liability in the case of a user "injured while using the [product] in a way it was intended to be used." (*Greenman, supra,* at p. 64.) It is not at all clear that standing upon a handrail (as a substitute for a ladder) has anything whatsoever to do with the handrail's "intended use."

Third is the certainty that the handrail Payne stepped on had not in fact been placed there by Newport News. Over her long service life prior to Payne's accident, *Ranger* had gone through many overhauls and repairs, but had remained (as noted above) in the Pacific throughout her service career, and had never been back to Newport News. During the repairs accomplished on *Ranger* by others (such as the Bremerton Naval Shipyard, for example) the handrails would routinely be removed and replaced. The rail Payne stepped on had in fact broken before, and been repaired.

court granted the motion, and entered judgment for Newport News.

On this appeal Payne argues (1) the government contractor defense set forth by Newport News is for a variety of reasons not applicable to these proceedings, (2) there are remaining material issues of fact which render summary judgment improper, and (3) the government contractor defense in any event does not apply to causes of action founded on negligence.

While review of a summary judgment requires us to consider the evidence below in the light most favorable to Payne, while taking the allegations of his complaint as true, as none of his contentions has merit, we nonetheless affirm.

DISCUSSION

I. GOVERNMENT CONTRACTOR DEFENSE

Payne first makes a variety of intertwined assertions that the government contractor defense is not properly applicable to the Navy's procurement of *Ranger*, handrails and all. In his pursuit of detail, Payne loses sight of the larger question.

In *Boyle, supra*, 487 U.S. at pages 504-512, the Supreme Court addressed the question of when state tort law would be displaced by federal policy, that is, how to define those "uniquely federal interests" which justify the preemption of state law. The court concluded that "[l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications;

(2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment." (*Id.* at p. 512.)

While Payne asserts the second[3] and third[4] requirements of *Boyle* are not met here, the heart of his challenge is to the proposition that *Ranger* was constructed according to "approved reasonably precise specifications." It is quite clear, however, that *Ranger's* construction was within the *Boyle* definitions.

Boyle concerned the design of the escape hatch on a CH-53D helicopter. The court noted that in this type of a case "the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of . . . mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of . . . mechanism shown by the specifications)." (*Boyle, supra,* 487 U.S. at p. 509.)[5]

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[3] Payne points to the fact that the engine room handrails as installed in 1989 did not appear to conform to specifications as evidence that *Ranger* was not built to specification. This is incorrect. *Ranger,* when accepted by the Navy in 1957, met specifications or she would not have been accepted. The handrails in question are routinely removed and replaced during overhauls, none of which was ever done by Newport News.

[4] See footnote 6, *infra.*

[5] While it was noted the result might have been otherwise in the case of a helicopter ordered from a standard catalog (*Boyle, supra,* 487 U.S. at p. 509), no one has here suggested that *Ranger* was ordered from a catalog rather than (as she was in fact) designed by the Navy, and built to Navy specifications by Newport News.

The conflict between a "state-imposed duty of care" and the duty imposed by the United States Government on a contractor, such as Newport News, to deliver a specified product, arises in cases such as this because "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function." (*Boyle, supra,* at p. 511.)[6] The exercise of that "discretionary function" is evidenced by the "reasonably precise specifications" of the procured equipment.

This is most necessarily true in the present case, involving procurement of a "Forrestal" class attack carrier. The United States Navy is both the only designer and the only purchaser of such objects in the world, and the procurement of an aircraft carrier is thus uniquely the result of an exercise of discretion by the United States Navy. It is this fact, that here the Navy's discretion (rather than that of Newport News) was exercised in the design of *Ranger*, that supports the necessary result.

Finally, we must note that in contrast to the procurement of a helicopter, which might be intended for transportation only, this matter involves procurement of a large and powerful man-of-war, a purpose-built military instrument intended (in the words of John Paul Jones) "to

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[6] Payne relies extensively upon *Trevino v. General Dynamics Corp.* (5th Cir. 1989) 865 F.2d 1474, for the proposition that there was no Navy *approval* of reasonably precise specifications. *Trevino*, however, is inapposite, as in that case the Navy had contracted with General Dynamics to *design* the diving chamber, the failure of which was there in issue. (*Id.* at pp. 1476-1477.) Here, of course, the design for *Ranger* originated with the Navy.

go in harm's way."[7] The design of a warship, and particularly a vessel such as *Ranger,* must always embody a great many compromises between battle capability and the safety of her crew.[8]

There could be no clearer instance of a case conforming to the rationale of *Boyle* than this one. An aircraft carrier in its current form is uniquely a product of and for the United States Navy, which had and has the discretion to determine how far the interests of safety in general should intrude upon the necessary emphasis upon maximum combat capability. As any reading of *Boyle* demonstrates, there must be immunity for those who only construct the requested and detail-specified warship to Navy requirements.

This is the essential point unaddressed by Payne: Does this case involve a design originated by Newport News, or by the Navy? If (as in *Boyle*) procurement of a Marine helicopter to government specifications represents a "uniquely federal interest," then it is necessarily

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[7] "I wish to have no Connection with any Ship that does not sail fast, for I intend to go in harm's way." (Hagan, This People's Navy (1991), p. 15.)

[8] In light of the simple fact that *Ranger* was a ship of the line, exposed to the extraordinary hazards of war and the "ordinary" but many hazards which inhere in the business of carrier aviation, Payne's subsidiary assertion, that the third *Boyle* requirement is not met because Newport News had a duty to warn the Navy *Ranger*'s handrails might corrode, is without any foundation, and we reject it. The Navy is well aware that all metals in a salt water environment corrode continuously. This simple physical fact cannot be transmuted into a "hidden defect" known only to Newport News, which should have been disclosed.

true that procurement of a Navy-designed aircraft carrier, such as *Ranger*, is a "uniquely federal interest."

"In essence, [Payne's] argument is that the ultimate design of the [handrail] failed to produce an aircraft [carrier] that performed perfectly. [Payne's] view would render the government contractor defense illusory." (*Kleemann v. McDonnell Douglas Corp.* (4th Cir. 1989) 890 F.2d 698, 703.) In this case, the Navy not only approved "reasonably precise specifications," it in fact created those precise specifications, as well as the design of the wholly unique product, *Ranger*, to which they applied. There could be no clearer instance of a case than the present one for application of the government contractor defense as set out in *Boyle, supra*, 487 U.S. 500.

II. MATERIAL ISSUE OF FACT

Payne next asserts summary judgment is improper where there is a triable issue of material fact. This is correct. Payne also urges that this is such a case. This is incorrect. His assertion is founded wholly on his challenge as to whether the elements of the government contractor's defense were established below (i.e., "were the specifications relied upon by Newport News approved by the Navy[?]"). As we have held above that all of the elements of the government contractor's defense were in fact established in this case, this point is necessarily mooted.

III. NEGLIGENCE

Payne last asserts that *Boyle*, while covering actions in strict liability, does not apply to his assertion the injuries he received were as a result of negligence by Newport News. In the broader sense his assertion is contradicted by the plain language of *Boyle* (government procurement "cannot be regulated by state tort law," 487 U.S. at p. 511) and by cases interpreting it, such as *Skyline Air Service, Inc. v. G.L. Capps Co.* (5th Cir. 1990) 916 F.2d 977, 979, and *Smith v. Xerox Corp.* (5th Cir. 1989) 866 F.2d 135, 137 ("*Boyle* . . . held that the government contractor defense applies to both negligence and strict liability actions, as well as to other state law tort claims").

The particular allegation, however, that the handrail was negligently *manufactured* by Newport News, may present a logical exception to the government contractor defense. (See, e.g., *McGonigal v. Gearhart Industries, Inc.* (5th Cir. 1988) 851 F.2d 774, 777.) We need not pursue the question.

There must be more than a mere conclusory assertion of some theory of liability to survive a motion for summary judgment; there must be some suggestion at least that there exist facts in support of it. In this case, no such possible factual basis for the asserted liability has been set forth,[9] and there is in this case no evidence whatsoever suggesting the handrails when manufactured were

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[9] Indeed, because the handrail which broke under Payne had certainly not been placed there by Newport News (see fn. 2, *supra*), as matter of logical necessity Newport News could not have negligently manufactured it.

other than as specified and required. The grant of summary judgment may not be set aside for this reason. (*Skyline Air Service, Inc. v. G.L. Capps Co., supra,* 916 F.2d at pp. 979-980; *Smith v. Xerox Corp., supra,* 866 F.2d at p. 139.)

DISPOSITION

Judgment affirmed. Respondent to recover costs on appeal.

/s/ Nares
NARES, J.

WE CONCUR:

/s/ Benke
BENKE, Acting P.J.

/s/ Huffman
HUFFMAN, J.

Supreme Court, U.S.
FILED
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No. 93-1517

In The

Supreme Court of the United States

October Term, 1993

LARRY PAYNE,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, INC.,

Respondent.

On The Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California; Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a substantial federal question raised in light of this Court's prior decisions?

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STATUTE

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On The Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California; Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Newport News Shipbuilding and Dry Dock Company, Inc., hereby request that the Petition for a Writ of Certiorari to review the judgment by Petitioner, Larry Payne, be denied.

STATEMENT OF THE CASE

On September 30, 1993, the California Fourth District Court of Appeal affirmed the trial court's granting of **NEWPORT NEWS SHIPBUILDING AND DRY DOCK**

COMPANY INC'S[1] Summary Judgment Motion in a non-published opinion. The California Supreme Court denied Petitioner's Petition for review of the decision of the Court of Appeal on December 29, 1993. The basis of the Motion for Summary Judgment was that, as a matter of law, the "government contractor defense," as enunciated in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed. 2d 442, 108 S.Ct. 2510 (1988) and *Vermuelen v. Superior Court*, 204 Cal.App. 3d 1192, 251 Cal. Rptr. 805 (1988), (commonly called the "*Boyle* defense") was applicable.

In his Petition for Writ of Certiorari, Petitioner **LARRY PAYNE** ("**PAYNE**") asserts the government contractor defense does not apply to handrails located on aircraft carriers because they are not "military equipment." Respondent agrees that the government contractor defense applies only to "military equipment," but maintains that handrails on board an aircraft carrier are indeed military equipment subject to this defense. In considering this issue, the Court of Appeal agreed with Respondent and affirmed the trial court.

PAYNE further asserts the government contractor defense is not applicable because the United States did not approve reasonably precise specifications. As regards this issue, both the trial court and the Court of Appeal considered the evidence, and found that the United States had approved reasonably precise specifications.

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[1] Hereinafter "**NEWPORT NEWS.**" Its parent corporation is Tenneco InterAmerica Inc., a wholly owned subsidiary of Tenneco Corporation. Newport News has no subsidiaries except for those that are wholly owned.

PAYNE, an active duty sailor in the United States Navy, sued **NEWPORT NEWS** for damages allegedly incurred when he was injured aboard the **U.S.S. RANGER** ("**RANGER**"), an Aircraft Carrier **NEWPORT NEWS** built for the United States Navy and commissioned in 1957. **PAYNE** claims he was injured when a handrail upon which he was standing collapsed.

A handrail is a piece of tubing located three feet above a deck. It is held up by poles that are called stanchions. Handrails are located on various areas of the ship to protect someone on the deck from falling. For example, there are handrails called life rails on the exterior decks which help prevent sailors from falling into the sea. Handrails in the shaft alleys, where **PAYNE** alleges the accident occurred, are for the purpose of providing stability and protecting a sailor from falling onto machinery from the deck.

NEWPORT NEWS established by uncontroverted evidence that (1) the handrail was required to meet reasonably precise specifications that had been approved by the Navy; (2) the handrail conformed to these specifications when **NEWPORT NEWS** delivered the **RANGER** to the Navy in 1957, and (3) **NEWPORT NEWS** was unaware of any danger in use of the handrail. These three elements constitute the government contractor defense. Upon considering the evidence, the trial court correctly ruled **NEWPORT NEWS** had established, as a matter of law, that the government contractor defense applied to this case. Therefore, **NEWPORT NEWS** was entitled to Summary Judgment.

PAYNE'S account of how the alleged accident occurred is as follows:

PAYNE was assigned to duty on the **RANGER** on August 24, 1989. He alleges that on or about September 4, 1989, a handrail broke when he placed his feet on the handrail while descending a vertical ladder, causing him injury. **PAYNE** testified that the accident occurred aboard the **RANGER** when he and Victor Caraballo, another sailor, were lowering cans of oil to the number eight deck (the lowest deck of the ship) in an area referred to as a "shaft alley." This shaft alley is located adjacent to the number 3 Main Machinery Room. One reaches this shaft alley by descending a ladder through a shaft called a scuttle.

PAYNE was on the number two deck and lowered a rope with cans of oil and some cleaning equipment to Caraballo, who waited below in the shaft alley on the number eight deck. He then dropped the rope down the scuttle to the shaft alley and climbed down the ladder. **PAYNE** testified that it took him a minute or less to descend the vertical ladder from the second deck to the eighth deck. As he was descending the ladder to the shaft alley, Caraballo was at the bottom of the ladder untying the rope. Caraballo told **PAYNE** to "step over." **PAYNE** stepped over him onto the handrail.

PAYNE understood handrails were not placed there for the purpose of placing one's feet upon while descending a ladder. Nevertheless, **PAYNE** did not ask Caraballo to move. Instead, he first placed his feet on the handrail. Then, he shifted his weight and placed his left hand on an angle iron for stability. As he was about to place his right

hand on the angle iron, the handrail upon which his feet were placed broke. He testified this is what caused his injury.

SUMMARY OF REASONS FOR DENYING THE WRIT

The writ should be denied for the following reasons:

1. No substantial federal question is raised in the Petition. The trial court and the California Court of Appeal correctly followed this Court's ruling in *Boyle*. This decision does not conflict with the decision of another State Court of last resort or of the United States Court of Appeals.

2. The "product" is indeed "military equipment." The handrail was part of an aircraft carrier manufactured by **NEWPORT NEWS** for the government at the government's request, pursuant to specifications that were either mandated by the United States or agreed upon by the United States and **NEWPORT NEWS**. The handrail was not produced for sale to the general public.

3. The handrail specifications set out by the United States are reasonably precise. The Navy mandated precise specifications, including, the dimensions of the handrail, the metallurgical content of the handrail, and its fittings.

4. The United States approved the specifications. The United States, itself, specified in a reasonably precise manner the design and material properties of the handrail and thus government approval is not even an issue. In addition, **NEWPORT NEWS** refined the specifications

in 3 additional drawings which were approved by the United States.

5. The handrail conformed to the specifications at the time **NEWPORT NEWS** delivered the **RANGER** to the Navy. The Navy would not have accepted the **RANGER** if the handrail did not so conform. The reason the handrail does not presently conform with the specifications is that it has been repaired and replaced on numerous occasions, before and after **PAYNE's** alleged accident.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED IN LIGHT OF THIS COURT'S PRIOR DECISIONS

Petitioner **PAYNE** claims this case is of critical importance because the government contractor defense is being stretched far beyond its intended bounds. In support of this argument, his attorney claims that in some other product liability case, a Federal District Court granted a Motion for Summary Judgment in favor of the defendant manufacturer pursuant to the government contractor defense because a metal water pitcher, which was sold to the Navy through a government contract, gave rough specifications of the pitcher's size (Pet. pp. 3, 4).[2] If **PAYNE's** counsel believes that decision was incorrect, he should have petitioned this Court to review it. However, it has absolutely no relevance to the instant matter, involving an integral piece of equipment which forms

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[2] Pet. refers to Payne's Petition to this Court for a Writ of Certiorari.

part of an aircraft carrier, that was manufactured pursuant to reasonably precise specifications approved by the United States. Respondent suggests that the fact Petitioner found it necessary to raise this unrelated, factually dissimilar "red herring" is an eloquent admission of the hollowness of his case.

As this instant matter was decided on a Summary Judgment Motion, **NEWPORT NEWS** had the burden of proving to the trial court that there was no triable issue as to any material fact, and that it was entitled to judgment as a matter of law. **NEWPORT NEWS** had to overcome the burden, under California law, that, "the granting of a summary judgment is a drastic remedy, and if there is any issue of material fact to be tried, summary judgment must be denied." *Weiss v. Valenzuela*, 204 Cal.App. 3d 1094, 1097, 251 Cal. Rptr. 727 (1988).

Thereafter, because **PAYNE** appealed the finding of summary judgment, the Appellate Court independently determined whether there was any triable issue of material fact and construed **NEWPORT NEWS'** papers strictly and **PAYNE's** papers liberally. *Oswald Machine & Equipment, Inc. v. Yip*, 10 Cal.App. 4th 1238, 13 Cal. Rptr. 2d 193 (1992). The Court of Appeal addressed this very issue and stated:

> While review of the summary judgment requires us to consider the evidence below in the light most favorable to Payne, while taking the allegations of his complaint as true, as none of his contentions has merit, we nonetheless affirm.

(Pet. App. 5).

All of the issues raised by **PAYNE** before this Court were considered by the California Court of Appeal. As will be shown, after considering the very arguments **PAYNE** is raising before this Court, the California Court of Appeal correctly ruled that, as a matter of law, **NEWPORT NEWS** was entitled to summary judgment.

This Court will refuse to review a State Court's judgment where no substantial federal question is raised in light of this Court's prior decisions. *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, 59 S.Ct. 259, 83 L.Ed. 231 (1939). **PAYNE's** contention notwithstanding, no substantial federal question has been raised in light of this Court's prior decisions. This Court enunciated the elements of the government contractor defense in *Boyle*. As is clear from the appendix to **PAYNE's** petition, in affirming the summary judgment, the California Court of Appeal correctly followed *Boyle*. Upon considering the evidence presented, and applying that evidence to the elements set forth in *Boyle*, the trial court and Court of Appeal determined that summary judgment was appropriate. Nothing stated in the Court of Appeal decision is contrary to the guidelines set out by this Court in *Boyle*. No state court of last resort or United States Court of Appeal has decided the *Boyle* issue in a way that conflicts with the California Court of Appeal in the instant matter. Thus, contrary to **PAYNE's** assertions, this case has no federal importance. All of the arguments raised by **PAYNE** in his petition were considered by the Court of Appeal and found to have no merit, according to this Court's prior pronouncements. Therefore, there is no reason for a Writ of Certiorari to be granted.

THERE IS NO MERIT TO PETITIONER'S ASSERTION THAT THE HANDRAIL IS NOT MILITARY EQUIPMENT

The need for the "product" to be "military equipment" in order for the government contractor defense to be applicable, is stated by this Court in *Boyle, supra,* as follows:

> . . . If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

(487 U.S. at 509).

PAYNE did *not* raise the issue of "military equipment" at the trial court in his opposition to the Summary Judgment Motion. **PAYNE** raised this issue for the first time in his *Reply* Brief before the California Court of Appeal. Nevertheless, this argument was considered by the California Court of Appeal in rendering its decision:

> While it was noted the result might have been otherwise in the case of a helicopter ordered from a standard catalog (Boyle, *supra,* 487 U.S. at p. 509), no one has here suggested that **RANGER** was ordered from a catalog rather than (as she was in fact) designed by the Navy, and built to Navy specifications by Newport News.

(Pet. App. 6, fn. 5).

. . .

> This is most necessarily true in the present case, involving procurement of a 'Forrestal' class attack carrier. The United States Navy is both the only designer and the only purchaser of such objects in the world, and the procurement of an aircraft carrier is thus uniquely the result of an exercise of discretion by the United States Navy. It is this fact, that here the Navy's discretion (rather than that of Newport News) was exercised in the design of **RANGER**, that supports the necessary result.

(Pet. App. 7).

. . .

> There could be no clearer instance of a case conforming to the rationale of *Boyle* than this one. An aircraft carrier in its current form is uniquely a product of and for the United States Navy, which had and has the discretion to determine how far the interests of safety in general should intrude upon the necessary emphasis upon maximum combat capability. As any reading of *Boyle* demonstrates, there must be immunity for those who only construct the requested and detail-specified warship to Navy requirements.

(Pet. App. 8).

The test of whether a "product" is "military equipment" is whether the "product" was manufactured for the government at the government's request, pursuant to specifications agreed upon by the government and manufacturer, or whether it was a product, produced for sale to the general public, that just happened to be purchased by

the government. As an example, an air conditioner would typically be considered a general commercial product, not subject to the government contractor defense. However, when the government reviews the design of the air conditioner and thereafter approves it before the air conditioner is manufactured, the air conditioner is considered military equipment, subject to the government contractor defense. See, *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991).

Another example of this distinction is the purchase of asbestos products. In *Vermuelen v. Superior Court*, 204 Cal.App. 3d 1192, 251 Cal. Rptr. 805 (1988), a group of complex asbestos litigation cases, the California Court of Appeal ruled that in any case involving alleged exposure to asbestos by a plaintiff, the evidence of compliance with government specifications was admissible and was governed by the *Boyle* standards. However, in *In re Hawaiian Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992) the plaintiff introduced evidence that the asbestos insulation sold by the defendants to the Navy was the very same insulation the defendants marketed to commercial buyers. The insulation was not manufactured with the special needs of the military in mind, and the military constituted a relatively insignificant purchaser of products that were primarily designed for application by private industry. The products responsible for the alleged injuries were not specialized items of military equipment but were, instead, goods sold on the ordinary commercial market. (*Id.* at 812).

The court recognized:

> These same concerns do not exist in respect to products readily available on the commercial market. The fact that the military may order such products does not make them 'military equipment.' The products have not been developed on the basis of involved judgments made by the military but in response to the broader needs and desires of end-users in the private sector. The contractors, furthermore, already will have factored the costs of ordinary tort liability into the price of their goods. That they will not enjoy immunity from tort liability with respect to the goods sold to one of their customers, the Government, is unlikely to affect their marketing behavior or their pricing.

(*Id.* at 811).

On pages 5 and 6 of his Petition, **PAYNE** contends that the decision of the California Court of Appeal in this matter is inconsistent with the decision of the Ninth Circuit in the *In re Hawaiian Federal Asbestos Cases*. This assertion is without merit. As shown, above, the holding in the *In re Hawaiian Federal Asbestos Cases* was based on the recognition that the asbestos products at issue were manufactured for the commercial market and, coincidentally, the government purchased a small amount of them. This rationale is not inconsistent with the ruling of the California Court of Appeal in this matter.

In the instant matter, the uncontested facts prove the handrail was manufactured pursuant to both government specifications, and drawings prepared by **NEWPORT NEWS** that were approved by the government before **NEWPORT NEWS** was given authority to construct the

RANGER. Additionally, the Navy inspected the **RANGER**, including the handrail, to assure it conformed to the Navy specifications before it accepted the **RANGER**.

There may well be numerous products on the **RANGER** that were produced for the general public or that could have been ordered out of some catalog. But this category does not include handrails, built to Navy specifications and Navy approved drawings, and whose purpose is to protect U.S. Navy sailors from falling on the machinery found in an aircraft carrier.

PAYNE further cites *Neilsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990) and *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied* 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed. 2d 174 (1984) in support of his contention that the handrail was not "military equipment." Neither case has any relevance to the instant matter. In *Neilsen*, the Ninth Circuit found the government contractor defense *was applicable* in a case where a civilian employee of the United States Army Corps of Engineers sued a paint manufacturer for injuries caused by his exposure to paint products. The District Court granted the Defendant's Summary Judgment Motion. On appeal, the Ninth Circuit affirmed the granting of summary judgment on claims of strict liability and negligence. The rationale for affirming the trial court's granting of summary judgment was the applicability of the government contractor defense. The Ninth Circuit reversed the finding of summary judgment on a failure to warn claim, because the defendant's motion did not address the adequacy of the warnings themselves. The Ninth Circuit ruled that the defendant had not pointed to

any mandatory specification in a paint contract that described warnings in a certain form for all containers of paint, or that precluded the inclusion of additional warnings. (892 F.2d at 1457).

Likewise, *McKay*, which precedes *Boyle*, is of no value to plaintiff. In *McKay*, the Ninth Circuit reversed the judgment of the District Court holding a manufacturer liable for the death of two pilots. The rationale for reversing the District Court was that the government contractor defense was applicable. The *McKay* Court stated:

> We recognize that the term 'military equipment' is somewhat imprecise, and that at some point lines will have to be drawn. We do not do so here. The line, however, lies somewhere between an ordinary consumer product purchased by the armed forces – a can of beans, for example – and the escape system of a Navy RA-5C Reconnaissance Aircraft. The latter falls within the terms while the former does not.

(704 F.2d at 451).

This very issue was considered by the California Court of Appeal which correctly found that the handrail was a military item.

Therefore, Petitioner's contention that the handrail is not a piece of "military equipment" is without merit.

THE UNCONTROVERTED EVIDENCE ESTABLISHED THE UNITED STATES APPROVED REASONABLY PRECISE SPECIFICATIONS

The question of whether the United States approved reasonably precise specifications was considered by the California Court of Appeal, which held:

> . . . In this case, the Navy not only approved reasonably precise specifications, it in fact created those precise specifications as well as the design of the wholly unique product, *Ranger*, to which they applied. There could be no clearer instance of a case than the present one for application of the government contractor defense as set out in *Boyle*, supra, 487 U.S. 500.

(Pet. App. 9).

In his Petition, **PAYNE** divided the first element of the *Boyle* defense (the United States approved reasonably precise specifications) into two separate issues, viz (1) were the specifications reasonably precise and (2) did the United States approve the specifications. Although it is difficult to analyze these sub-elements separately, **NEWPORT NEWS** has done this, for the convenience of this Court, so its Brief corresponds with **PAYNE**'s Petition.

THE UNCONTROVERTED EVIDENCE ESTABLISHED THE SPECIFICATIONS ARE REASONABLY PRECISE

The uncontroverted evidence established that the Government did more than just approve reasonably precise specifications: the Navy *mandated* very precise specifications. First of all, the specifications for handrails and stanchions, S16-1-g, applicable to all Navy ships, sets out

numerous details. Among other things, it required the handrails to be tubing (as opposed to solid metal). Further, the tubing was required to be not greater than 1¼ inches. Next, the **RANGER** specifications deleted **NEWPORT NEWS'** ability to use either steel or aluminum handrails: aluminum was required. The Government even specified the properties for the aluminum. The Government further specified the fittings.

Additionally, **NEWPORT NEWS** prepared three drawings which also state in a reasonably precise manner the design and material properties of the handrails.

These drawings, used to construct the handrails, fittings and stanchions in the number 3 Main Machinery Room, conformed to these contractually required specifications. Indeed, the Navy approved these drawings during construction and prior to delivery. It is important to note this design reflected the Navy specifications in several important ways:

1. The handrails were to be made of aluminum;
2. The properties of the aluminum were in accordance with the government specification;
3. The aluminum handrails were to be connected either to steel stanchions or steel bulkhead fittings; and
4. All fittings were tight and required the use of pins.

In an effort to create a controversy, Appellant argues that not all details relating to the design are included in the drawings and specifications.

One can always come up with additional details that are not included in drawings and specifications. It would be impossible for drawings and specifications to cover every conceivable detail that goes into the design of an item. But that is not the test enunciated in *Boyle*. The test is whether the drawings and specifications state in a *reasonably* precise manner the design and material properties of the handrails; not whether every conceivable detail is included. Having considered the evidence, the trial court and the California Court of Appeal concluded that the drawings and specifications did state in a reasonably precise manner the design and the material properties of the handrails.

The meaning of "reasonably precise specifications" has been addressed in several Federal Circuit Court decisions. In *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), retired Justice Powell explained that the *Boyle* defense requires only that the Government approve *reasonably* precise specifications. The Court held that where a contractor incorporated Government *performance* specifications into a design that the Government subsequently reviewed and approved, this test was met. (*Id.* at 1320). The *Harduvel* test is met, *a fortiori*, in the instant matter. **NEWPORT NEWS** was required to construct the handrails in strict accordance with at least five Government specifications or drawings. These were *design* specifications. If **NEWPORT NEWS** were only required to meet *performance* specifications, it would have had the flexibility to design the handrails as it pleased so long as the design resulted in a product that would meet the performance specifications.

The Fifth Circuit (which decided *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), relied upon by **PAYNE**) has also addressed the issue of what "reasonably precise specifications" means. In *Smith v. Xerox Corporation*, 866 F.2d 135 (5th Cir. 1989), a case decided on February 23, 1989, the same day *Trevino* was decided, the Court held that because the Government supplied the relevant environmental specifications that it wanted the product to meet, which were incorporated into the contractor's production contract, and because the Government reviewed and approved the contractor's drawings and specifications, the contractor had satisfied its burden of proof on the issue of "reasonably precise specifications." (*Id.* at 138).

In *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991), after its *Trevino* decision, the same Fifth Circuit again determined the meaning of "reasonably precise specifications" and found that an air conditioning unit contained reasonably precise specifications even though the specifications were *silent* on the subject of a safety device that would prevent human contact with a condenser fan while the air conditioner was in operation. The contractor admitted that the specifications prepared by the Government did not include or prohibit the installation of a safety device. The design of the condenser fan initially came from the Government and thereafter was refined by the contractor. The Court held that even though nothing in the specifications prevented the contractor from designing a safety device, the specifications were nevertheless reasonably precise.

This is analogous to the instant matter. Even if the Navy specifications did not specify the distance between

stanchions, as **PAYNE**'s "expert" contends, that is not the test. The Navy chose to not leave the design of the hand rails to the discretion of **NEWPORT NEWS**. Instead, it provided detailed specifications regarding the handrails. Thereafter, **NEWPORT NEWS** refined these specifications with its drawings, which were approved by the Navy.

In an attempt to muddle this matter, **PAYNE** incorrectly and improperly asserts that **NEWPORT NEWS'** expert, Michael Sampsel, essentially conceded at his deposition that the specifications were not reasonably precise. (Pet. pp. 11, 12). This is untrue and distorts Mr. Sampsel's testimony. Mr. Sampsel is a retired Naval Officer. As Mr. Sampsel testified, his assignment was to look at the original design of the handrails and form opinions on certain subject matters. He opined that the design was reasonable; that it was approved by the Navy; that it was accepted by the Navy; that it stood the test of time; and that the present installation is not currently in accord with the design. Mr. Sampsel further provided a declaration in support of **NEWPORT NEWS'** Motion for Summary Judgment. His deposition was taken because he was designated as an expert by **NEWPORT NEWS**. **NEWPORT NEWS** would have used him as an expert if there had been a trial in the limited areas of the subject matter stated in his opinions and in his declaration. However, at the time his deposition was taken, he was required to respond to all questions asked by **PAYNE'S** attorney that might reasonably lead to the discovery of admissible evidence. (California Code of Civil Procedure § 2017(a)). In this vein, **PAYNE'S** attorney asked him questions regarding how a mechanic follows a drawing in constructing a ship.

Mr. Sampsel never worked for **NEWPORT NEWS** and in fact never had any previous relation with **NEWPORT NEWS** prior to being retained as an expert by **NEWPORT NEWS'** attorney in this matter. Therefore, his testimony was based on his understanding of how ships are typically built, not how the **RANGER** was constructed in 1957.

Mr. Sampsel testified that, "this drawing represents the actual construction details that would be given to the mechanic to build a ship from." Mr. Sampsel then testified:

> There are two other related drawings. I think we need to define what's commonly termed 'field run' in the shipbuilding, ship construction area. Certain things are given to you as guidance or design information, and then you go down on the ship and you are expected to run it from point "A" to point "B" in accordance with the specifications you've been given to the best of your ability.

The sum and substance of Sampsel's testimony is that the ship would be built in accord with the drawings. From this testimony, Appellant has come up with the preposterous statement that, "In other words, it was the **NEWPORT NEWS** shipfitter who installed the handrails, and exercised discretion over how and in what manner the handrail was to be configured and how far apart the vertical stanchions were to be, not the Navy." (Pet. p. 12).

This statement totally distorts Sampsel's testimony that it was a general practice in the industry that a shipfitter would install the handrails in accord with the appropriate drawing. Mr. Sampsel did not state or infer

that the shipfitter would install the handrails in a manner that did not conform with every detail stated in the appropriate drawings and specifications.

Because the government mandated specific design requirements, there is no merit to **PAYNE**'s contention that the specifications were not "reasonably precise."

THE UNCONTROVERTED EVIDENCE ESTABLISHED THE UNITED STATES APPROVED THE SPECIFICATIONS

NEWPORT NEWS' evidence in support of its Motion for Summary Judgment established that the *Government* itself specified in a reasonably precise manner the design and material properties of the handrails. Thus, Government approval is not even an issue. The Navy drawings and specifications were set out in five different exhibits used in support of the Summary Judgment Motion. The drawings prepared by **NEWPORT NEWS** were required to, and did, conform to these Navy drawings and specifications.

In an effort to circumvent the uncontroverted evidence, **PAYNE** contends that the facts in this case resemble the facts in *Trevino, supra*. However, the facts in *Trevino* are substantially different than the facts in the instant matter. In *Trevino*, General Dynamics was not hired by the Government to build anything. Instead, General Dynamics was hired by the Government for the *sole purpose of designing* a diving hanger. All the Navy did was establish a basic design concept. The design itself was left to General Dynamics. When General Dynamics completed its design, the Navy then manufactured the diving

hanger. (*Id.* at 1476-77). The failure of the diving hanger was in the design prepared by General Dynamics, the only thing that General Dynamics was hired to do.

The *Trevino* Court noted that the District Court had held that the contract left the design entirely to the discretion of General Dynamics and that the Navy set only general performance standards, leaving the details to General Dynamics. (*Id.* at 1486). The District Court further noted that the system as designed by General Dynamics did not even conform to the general requirements provided by the Navy. (*Id.* at 1487).

The *Trevino* Court determined that, under these circumstances, where General Dynamics was hired to do nothing but the design work, and was left free to do the design work as it chose, within a basic concept, and where there was no evidence that Government employees did anything other than merely "rubber-stamp" their approval of the design, there was no necessary "approval" as set out in *Boyle*. The Court stated that "approval" under the *Boyle* defense requires more than a rubber stamp. (*Id.* at 1480).

The *Trevino* Court explained its ruling by stating:

> The government contractor defense as reformulated in *Boyle* protects government contractors from liability for defective designs if discretion over the design feature in question was exercised by the government. If the government delegates its design discretion to the contractor and allows the contractor to develop the design, the government contractor defense does not apply.

(*Id.* at 1486).

Under those circumstances, it is understandable why the *Trevino* Court found that General Dynamics did not establish the first prong of the *Boyle* defense, that the United States approved reasonably precise specifications.

The *Trevino* Court noted that the sufficiency of the Government approval was not an issue in *Boyle*. (*Id.* at 1480). Likewise, the sufficiency of the Government approval is not an issue here. In the instant matter, unlike *Trevino*, there was no evidence that **NEWPORT NEWS** was hired by the Navy for the purpose of designing this aircraft carrier for the Navy to build. On the contrary, the evidence was that **NEWPORT NEWS** was hired to build this aircraft carrier in accord with detailed design and related specifications prepared by the Navy.

Five of the exhibits used in support of the Summary Judgment Motion were *Government* drawings and specifications, all of which imposed design constraints. The Government's involvement in the design of the handrails was so specific it dictated the physical dimensions and the metallurgical content of the handrails. It even dictated the fittings. **NEWPORT NEWS** was required to strictly follow the Government drawings and specifications. As the Government itself prepared these drawings and specifications, there is no issue regarding Government approval of them. Therefore, the instant matter is substantially different than *Trevino* where the *entire design* was left to the discretion of the contractor and the Government's role was limited to "rubber stamping" its approval of the contractor's drawings. The Navy did not merely "rubberstamp" the design of **NEWPORT NEWS** without considering it. Unlike *Trevino*, the Navy, not

NEWPORT NEWS, was the driving force behind the design.

In *Stout v. Borg-Warner Corp., supra*, the Fifth Circuit amplified its rationale in the *Trevino* decision. It distinguished between situations where the Government involves itself in the design process and situations where the Government merely accepts the contractor's design choice. When the Government involves itself in the design process, its actions constitute "approval" sufficient to establish the first prong of the *Boyle* defense. However, when the Government merely accepts the contractor's design choice, this action is characterized as "rubberstamping" and the *Boyle* defense is not applicable. (933 F.2d at 331).

Here, the Government was understandably deeply involved in the design of an aircraft carrier. Under these circumstances, coupled with the Navy's approval of detailed drawings and material lists, **NEWPORT NEWS** established, as a matter of law, that the Government approved reasonably precise specifications. Accordingly, upon considering the evidence, the trial court and the California Court of Appeal correctly found that **NEWPORT NEWS** has satisfied the first prong of the *Boyle* analysis.

THE UNCONTROVERTED EVIDENCE ESTABLISHED THE HANDRAILS DID CONFORM TO THE SPECIFICATIONS IN THE CONTRACT

Although not set out as a separate issue, on pages 15 and 16 of his petition, **PAYNE** argues that the handrails

did not conform to the drawings when the Ranger was delivered to the Navy.

As set out above, **NEWPORT NEWS** had to construct the ship, per contract, in accordance with detailed specifications. There exists a bill of materials for **NEWPORT NEWS'** use in its construction of the handrail system in the Main Machinery Rooms. This materials list is set out in a **NEWPORT NEWS'** drawing and was approved by the Navy on April 3, 1956. It was an exhibit to the Summary Judgment Motion. In addition, the uncontroverted evidence established that it was the Navy's custom and practice to inspect and then reject the product if it did not match the specifications. Inasmuch as the Navy accepted the ship in 1957, it follows that the Navy accepted the product. Under these circumstances, the only conclusion is that the handrails conformed to the Government's specifications in 1957. Thus, **NEWPORT NEWS** has satisfied the second prong of the *Boyle* analysis.

In an effort to circumvent this undisputed evidence, Appellant has attempted to manufacture a dispute by contending that the handrail, when inspected in 1990 by **PAYNE** and **NEWPORT NEWS**, over a year after **PAYNE'S** alleged accident, no longer conformed to the **NEWPORT NEWS'** drawings. **NEWPORT NEWS** agrees that none of the handrails on the **RANGER** conformed to the drawings when they were inspected long after **PAYNE'S** accident. For that very reason, **NEWPORT NEWS** moved, as an alternative ground for Summary Judgment, that **PAYNE** was unable to establish that handrails designed and installed by **NEWPORT NEWS** caused his alleged injury. As the trial court granted **NEWPORT**

NEWS' Motion for Summary Judgment by finding that the requirements under *Boyle* had been met, it never addressed this other ground for summary judgment.

The evidence presented by **NEWPORT NEWS** in support of the fact that the handrail that allegedly broke when **PAYNE** stood on it was not the handrail installed by **NEWPORT NEWS**, was the deposition transcript of Lieutenant Atchison, and the Declarations of Dennis Rasmussen and David Christie.

Christie, a **NEWPORT NEWS** engineer, declared that when he inspected the handrails where the accident allegedly occurred, plus the other shaft alleys aboard the **RANGER**, after the alleged accident, *not one* handrail conformed to the **NEWPORT NEWS'** drawings. He outlined the voluminous discrepancies.

Lieutenant Atchison, **PAYNE'S** Superior Officer who was stationed aboard the **RANGER** during the relevant time period and responsible for the Main Machinery Room Number 3, Shaft Alley, testified that the handrail that allegedly broke when **PAYNE** placed his weight upon it had been broken and repaired *before* **PAYNE'S** alleged accident. "The engineering spaces, in general, were in sort of a condition – a lower condition of preservation, and a lot of things were broken and not really repaired very well." He further testified no paperwork was generated regarding the repairs.

PAYNE himself testified that the entire handrail where the accident occurred was replaced, and he noticed it was replaced on November, 1990 when it was inspected for purposes of this litigation.

Rasmussen, a civilian employee of the Navy, declared that every five to seven years the **RANGER** (which has been in service since 1957) has undergone an overhaul. This includes removing shafting which may require removal of the handrails. Additionally, when repair work is done on valve manifolds, it is necessary to remove the handrails and stanchions. Because their removal is considered minor, no records are kept.

The only evidence offered in rebuttal was a letter from Judy Wise, Head of the Naval Sea Systems Command, Freedom of Information Division, who wrote that a thorough search produced no records of ship alterations performed on the handrails in the Shaft Alleys of the **RANGER**.

Considering the evidence of Lieutenant Atchison, Christie and Rasmussen, and further considering the Declaration of Michael Sampsel that the Navy would not accept the **RANGER** until it conformed to all drawings and specifications, and further considering **PAYNE'S** own testimony that the very handrail where his accident occurred had been replaced after his accident, and further considering the testimony of Mr. Rasmussen and Lieutenant Atchison that no records are kept of repair, removal and replacement of handrails (considered by them to be a trivial item in the overall repair and maintenance of an aircraft carrier), it is irrelevant and meaningless that no records of ship alterations performed on the handrails were found.

Thus, there is no evidence to dispute the finding that the handrails conformed to the specifications when the **RANGER** was delivered to the Navy in 1957.

This issue was raised before the California Court of Appeal. Having reviewed the evidence, it stated:

> Third is the certainty that the handrail Payne stepped on had not in fact been placed there by Newport News. Over her long service life prior to Payne's accident, *Ranger* had gone through many overhauls and repairs, but had remained (as noted above) in the Pacific throughout her service career, and had never been back to Newport News. During the repairs accomplished on *Ranger* by others (such as the Bremerton Naval Shipyard, for example) the handrails would routinely be removed and replaced. The rail Payne stepped on had in fact broken before, and been repaired.

(Pet. App. 4, fn. 2).

. . .

> Payne points to the fact that the engine room handrails as installed in 1989 did not appear to conform to specifications as evidence that *Ranger* was not built to specification. This is incorrect. *Ranger*, when accepted by the Navy in 1957, met specifications or she would not have been accepted. The handrails in question are routinely removed and replaced during overhauls, none of which was ever done by Newport News.

(App. 6, fn. 3).

> Indeed, because the handrail which broke under Payne had certainly not been placed there by Newport News (see fn. 2, supra), as matter of logical necessity Newport News could not have negligently manufactured it.

(App. 10, fn. 9).

CONCLUSION

Having applied the evidence to the guidelines set by this Court in *Boyle*, both the Trial Court and the California Court of Appeal determined that Newport News was entitled to summary judgment in this matter. There is no substantial federal question raised in light of this Court's prior decisions. Therefore, **PAYNE's** Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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